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Singapore as a centre for international commercial litigation: Party autonomy to the fore

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Singapore as a centre for international commercial litigation: party autonomy to the fore

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This article considers two recent developments in Singapore private international law: the establishment of the Singapore International Commercial Court and the enactment of the Hague Convention on Choice of Court Agreements 2005 into Singapore law. These two developments are part of Singapore's strategy to promote itself as an international dispute resolution hub and are underscored by giving an enhanced role to party autonomy. This article examines the impact of these two developments on the traditional rules of private international law and whether they achieve the stated aim of positioning Singapore as a major player in the international litigation arena.

Keywords: conflict of laws; private international law; party autonomy; jurisdiction; extraterritorial jurisdiction; choice of court agreements; foreign judgments; Hague Choice of Court Agreements Convention

A. Introduction

The last few years can fairly be said to be momentous years in terms of the development of Singapore's private international law landscape. This is primarily due to two developments. First, the Singapore International Commercial Court (the "SICC") was established on 5 January 2015. The SICC is a specialist court which caters to international commercial litigation. Secondly, the Hague Convention on Choice of Court Agreements 2005 ("HCCCA") entered into force in Singapore law on 1 October 2016.[1]

These two developments go hand-in-hand and are part of Singapore's strategy to promote the nation as an international dispute resolution hub.[2] Looking outwardly, Singapore's strategy coheres with the emerging trend of judicial

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[1]The implementing legislation is the Choice of Court Agreements Act 2016.
[2]Singapore has adopted a three-pronged approach in this regard: through the promotion of litigation (SICC in particular), arbitration (Singapore International Arbitration Centre) and mediation (Singapore International Mediation Centre).

specialisation and competition for judicial business.[3] Looking deeper within, Singapore's developments are underscored by party autonomy; in some circumstances the boundaries of the scope of party autonomy have been stretched beyond orthodoxy.

This article has as its aim the consideration of these two key developments in Singapore private international law. Their impact on traditional conflict of laws and whether they achieve the aim of positioning Singapore as a major player in the international litigation arena will be examined. To that end, this article is divided in three main parts. First, by way of background, we will discuss the creation of the SICC and its salient features, as well as an evaluation of the SICC's appeal to potential users. Secondly, we will compare the pre-SICC jurisdictional principles applied by the Singapore High Court with the *in personam* jurisdictional framework of the SICC. In particular, we will consider the interplay between the SICC framework with the traditional *Spiliada* test. Thirdly, the impact of Singapore's ratification of the HCCCA on Singapore's jurisdictional laws and the enforceability of Singapore court judgments abroad will be considered.

B. The SICC: survey

The SICC, a litigation model inspired by the English Commercial Court,[4] was launched on 5 January 2015. The feasibility study preceding the creation of the SICC stated that, as a result of the continued growth of cross-border investment and trade in Asia, there is a need for "a neutral and well-regarded dispute resolution hub in the region".[5] In terms of framework design, the SICC bears three key characteristics that enhances Singapore's capacity to become that "neutral and well-regarded" dispute resolution centre: hybridisation, internationalisation and prioritisation of party autonomy. We will explain these three characteristics in greater detail below.

To gauge the SICC's appeal to its potential users, we conducted an online survey[6] between 26 January 2016 and27 July 2016 to study the factors that

[3]France, Belgium, Netherlands, Germany, China and Kazakhstan have taken steps to set up their models of international commercial courts. English courts are also undergoing rebranding and the Financial List, a specialist court, has been created to foster its position in commercial litigation. See http://www.judiciary.gov.uk/announcements/launch-of-business-and-property-courts/ accessed on 18 September 2018.

[4]See http://www.ft.com/cms/s/0/4c33f0c0-e716-11e3-88be-00144feabdc0.html#axzz3xOjZCIYM accessed on 18 September 2018.

[5]Report of the Singapore International Commercial Court Committee (November, 2013) ("*SICC Committee Report*), at http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf accessed on 18 September 2018.

[6]We would like to thank the Singapore Corporate Counsel Association for helping us to disseminate the survey to their network of partners worldwide and Mr Wong Taur-Jiun, Ms Angeline Joyce Lee and Mr Douglas Chi for comments on the draft survey. The survey results were presented at the In-House Counsel World Summit 2016 in Paris, France on 24 October 2016.

influence the decision-making process of corporate in-house counsel in choosing the kind of dispute resolution mechanism as well as the forum for resolving the dispute. We received 62 attempted responses to our survey,[7] out of which 47 responses were usable. Of the 47 respondents, 40 were based in Singapore, with the remaining respondents working in Japan, Australia, Hong Kong, Indonesia, Sri Lanka, and Canada. 39 respondents covered more than one jurisdiction in their work scope. Our respondents worked in diverse fields such as technology,[8] banking and finance,[9] and manufacturing.[10] Given the geographical demographic of the respondents, we are aware that the survey results may not accurately reflect, much less be conclusive of, the trends among in-house counsel *worldwide*. However, the survey results are indicative of the decision-making process of corporate in-house counsel working in the Asia Pacific region, especially Singapore—jurisdictions in which the SICC will likely first gain popularity.

In our survey,[11] respondents were asked to indicate which dispute resolution mechanism they would most frequently include in the contracts which they drafted and/or negotiated. Regardless of the respondents' geographical location or work scope, the overwhelming favourite was arbitration (54%), followed by litigation (35%).[12] Respondents were also asked to rank the top three factors which influenced their decision on the method of dispute resolution from a fixed list: speed, fairness, confidentiality, procedural flexibility, enforceability of outcome, cost, transparency and accountability in the dispute resolution process, and prestige and reputation of the adjudicating institution. The top three considerations in general were enforceability of outcome, cost and speed. In terms of the breakdown by favoured dispute resolution mechanism, respondents who favoured arbitration prioritised confidentiality, procedural flexibility, enforceability of outcome, cost and speed in their decision-making process. On the other hand, those who favoured litigation chose fairness, transparency and accountability in the dispute resolution process as being key factors.

[7]The survey responses were submitted anonymously.
[8]17 respondents.
[9]14 respondents.
[10]11 respondents.
[11]We asked a number of questions in the survey but only those relevant to this article will be addressed in this part.
[12]Mediation was chosen by 6% while 5% chose a combination clause. The preference for arbitration over other dispute resolution mechanisms is also reflected in the findings in the study conducted by Singapore Academy of Law's International Promotion of Singapore Law Committee ("SAL Study"). See a summary of the key findings from the SAL study (http://www.ciarb.org.sg/wp-content/uploads/2016/02/SAL_Singapore_Law_Survey.pdf accessed on 18 September 2018). In the SAL Study, enforceability of decisions was found to be a key priority in deciding the method of dispute resolution.

To better understand the overwhelming preference for arbitration, it is helpful to refer to the Queen Mary University of London and White & Case LLP 2018 International Arbitration Survey findings.[13] In summary, 97% of their survey respondents indicated arbitration as the preferred method of resolving cross-border disputes, either as a stand-alone (48%) or together with ADR (49%). In particular, within the in-house counsel subgroup respondents, 92% preferred international arbitration (as a stand-alone or together with ADR); 8% preferred cross-border litigation in conjunction with ADR; and no respondent chose cross-border litigation as a stand-alone. Generally, "enforceability of awards" was perceived as arbitration's best attribute, followed by "avoiding specific legal systems/national courts", "flexibility" and "ability of parties to select arbitrators". Arbitration's worst attributes are, in descending order, "costs", "lack of effective sanctions during the arbitral process", "lack of power in relation to third parties" and "lack of speed". Respondents also "think that arbitration rules should include provisions dealing with arbitrator conduct in terms of both standards of independence and impartiality and efficiency (or lack thereof)".

In light of the two sets of survey findings, how does the SICC compare with arbitration? To be clear, the SICC was not established with a view of supplanting or competing with arbitration.[14] Our evaluation should thus be focused on its viability as a dispute resolution option given the availability of international commercial arbitration. By way of an overview, the SICC is a hybrid framework incorporating the advantageous features of both litigation and arbitration. Under this framework, there is greater scope for the exercise of party autonomy in respect of procedural rules compared to the traditional litigation process.[15] Yet, unlike arbitration, parties' choices are generally subject to judicial approval. The parties to SICC proceedings may apply to the court for the disapplication of the Singapore rules of evidence and for the application of foreign rules or rules that are not part of a legal system.[16] Further, while foreign law is ordinarily treated as a question of fact which has to be pleaded and proven,[17] the parties of a SICC case may request that foreign law be determined on the basis of submissions instead.[18] In connection with this, foreign lawyers may more readily be granted leave to represent the parties in proceedings before

[13]http://www.arbitration.qmul.ac.uk/research/2018/ accessed on 18 September 2018.
[14]See S Menon (Chief Justice of the Supreme Court of Singapore), "International Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series 2015, 19 January 2015.
[15]For more details, see M Yip, "Special Reports – Singapore International Commercial Court: A New Model for Transnational Commercial Litigation" (2015) 32 *Chinese (Taiwan) Yearbook of International Law and Affairs* 155.
[16]Supreme Court of Judicature Act, s18K; Rules of Court, O 110, rr 23–24.
[17]*Greenline-Onyx Envirotech Phils, Inc v Otto Systems Singapore Pte Ltd* [2007] 3 SLR(R) 40 (CA), [24]; *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 (CA), [54].
[18]Supreme Court of Judicature Act, s 18L; Rules of Court, O110, rr 25–29.

the SICC,[19] especially if the case is an "offshore case".[20] There is also the possibility that proceedings be made confidential on the application of a party; again, special consideration will be given in an "offshore case".[21] Another novel feature is that the parties may agree in writing to waive, limit or vary their right to appeal against the SICC's judgment.[22] Finally, unlike the arbitral model, parties to SICC proceedings have no say over the appointment of judges. The power of appointment lies with the Chief Justice of Singapore.[23] Yet, it should be noted that the SICC, whilst a domestic court, operates on an internationalised framework. Other than experienced Singapore judges,[24] the SICC also boasts a panel of International Judges. At the time of writing, 15 International Judges – drawn from civilian and common law jurisdictions – have been appointed.[25] As such, whilst parties have no direct say over the appointment of the judges, the appointment outcome is not completely unpredictable as the applicable law is a factor taken into account in the appointment process.[26] Overall, the SICC framework enables a greater degree of procedural flexibility than traditional litigation but it also assures users of greater transparency and accountability in its dispute resolution process than arbitration.

In our survey, respondents were also asked what factors influenced their choice of forum for litigation. 93% of respondents who recommend litigation for resolving disputes arising out of at least some of the cross-border commercial contracts they handle ranked enforceability of outcome as the top consideration in their decision-making process. This is followed by the efficiency of the legal system, its maturity and whether it is an established legal system. Factors such as the

[19] *Singapore International Commercial Court Practice Directions*, Practice Direction No 26, http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions—effective-from-1-jan-2017.pdf accessed on 18 September 2018.

[20] An "offshore case" is an action with no substantial connection to Singapore. See Rules of Court, O 110, r 1(1).

[21] Rules of Court, O 110, r 30.

[22] *Singapore International Commercial Court Practice Directions*, *supra* note 32, Practice Direction No 139, incorporating the recommendations of the *SICC Committee Report*, *supra* note 5, [35]. On the SICC appeal framework, see generally J Yeo, "On Appeal from Singapore International Commercial Court" (2017) 29 *Singapore Academy of Law Journal* 574.

[23] The practice of allowing party-appointed arbitrator has come under trenchant attack: see S Menon, "Adjudicator, Advocate or Something in Between?: Coming to terms with the role of the party-appointed arbitrator" (2017) 34 *Journal of International Arbitration* 347.

[24] For more details, see: https://www.sicc.gov.sg/Judges.aspx?id=30 accessed on 18 September. For most recent appointments, see: https://www.channelnewsasia.com/news/singapore/four-new-judges-appointed-to-singapore-international-commercial-9828592 accessed on 18 September 2018.

[25] The International Judges do not enjoy security of tenure and are appointed for a fixed term.

[26] *Rappo v Accent Delight International Ltd* [2017] 2 SLR 265, [122].

geographic proximity and procedural rules of the litigation forum are not, in general, prioritised features.

The enactment of the HCCCA into Singapore law, discussed in Part D, will increase the enforceability of SICC judgments, at least where there is a forum choice of court agreement. As to efficiency, the Singapore Supreme Court has a target of disposing of 85% of all writ actions within 18 months of filing, a target which has been exceeded in recent years.[27] It would also be fair to say that the Singapore legal system is one of the more mature and well established in the region.

In relation to features which were ranked low in the order of priority in our survey, the relative unimportance of geographic proximity bodes well for SICC's aim of attracting "offshore cases". All in all, while it is early days to tell if the SICC will be a popular dispute resolution mechanism for the international business community,[28] its procedural rules are suitably attractive for it to be a viable option. But this is not quite enough, especially if its broader goal is to compete for judicial business with other litigation hubs. Its jurisdictional rules must also be user-friendly, particularly for attracting cases that would not otherwise be heard in Singapore. It is to this aspect of the SICC framework we now turn. We will show in Part C, by comparing both the traditional rules and the SICC rules, that party autonomy is and should be the philosophical foundation of the latter. Forum shopping is now something to be desired.

C. Jurisdiction

1. *Pre-SICC rules*

The basis of the jurisdiction of the Singapore High Court is found in the Supreme Court of Judicature Act ("SCJA").[29] Where civil *in personam* jurisdiction of the High Court is concerned, the key provisions are sections 16 and 17 of the SCJA. Section 16, encapsulating the English "common law"[30] approach, provides that

[27]This target has been regularly met or exceeded: CH Foo, E Chua and L Ng, "Civil Case Management in Singapore: of Models, Measures and Justice" (2014) *ASEAN Law Journal* 1, 20. Recent statistics on the clearance rate for civil matters can be found at "Shaping The Future of Justice: Supreme Court Annual Report 2016", 25 (http://www.supremecourt.gov.sg/docs/default-source/default-document-library/supreme-court355c3033f22f6eceb9b0ff0000fcc945.pdf accessed on 18 September 2018).

[28]To date, the SICC has handed down 30 judgments (including six appellate judgments), with some concerning procedural issues and others on substantive issues of law. In February 2018, a first non-transfer case was filed in the SICC. See http://www.sicc.gov.sg/HearingsJudgments.aspx?id=72 accessed on 18 September 2018.

[29]Cap 332, Rev Ed 2007.

[30]A shorthand for a combination of common law and legislation.

the Singapore High Court has jurisdiction over the defendant if the defendant has been *served* with the originating process in Singapore, has submitted to the jurisdiction of the court, or has been *served* with the originating process outside of Singapore in accordance with the Rules of Court.[31] This traditional regime reflects the common law view that service of legal process not only performs the function of notification of proceedings, it also creates jurisdiction. Section 17 further provides that jurisdiction of the High Court includes jurisdiction conferred by other written laws.

Conceptually, under Singapore law, it is crucial to distinguish between territorial personal jurisdiction and extra-territorial personal jurisdiction, as well as between existence and exercise of jurisdiction. Our discussion shall focus on the Singapore High Court's[32] extraterritorial jurisdiction, a key point of comparison with the SICC regime.[33] Territorial jurisdiction is established as of right.[34] Extra-territorial jurisdiction, on the other hand, is discretionary.[35] Singapore's approach towards service out of jurisdiction is generally consistent with the English approach for cases that fall within Article 6(1) of the Brussels Ia Regulation and Article 4(1) of the Lugano II Convention.[36] The requirements for obtaining leave from the Singapore High Court to serve out of jurisdiction are as follows:[37]

(a) the plaintiff's claim must be shown on the standard of "a good arguable case" that it falls within one of the heads of jurisdiction set out under Order 11 rule 1 of the Rules of Court;
(b) there must be a serious issue to be tried on the merits of the claim; and
(c) Singapore must be the proper forum for the trial of the claim, determined according to the principles enunciated in *Spiliada Maritime Corp v Cansulex Ltd*[38] (the *Spiliada* test).

[31]Cap 322, r 5.
[32]The SICC is a division of the Singapore High Court. In this article, references to the "Singapore High Court" or 'High Court' should be understood to mean the Singapore High Court *sans* the SICC, unless otherwise indicated.
[33]As the SICC is established to deal with international commercial disputes, it is expected that many of its cases would involve foreign defendants.
[34]The Singapore High Court has territorial jurisdiction over the defendant if the defendant has been served with the originating process in Singapore; the defendant has submitted to the jurisdiction of the Singapore High Court; or where special provisions have been made in other written laws.
[35]See Rules of Court, O 11, r 2.
[36]Civil Procedure Rules Part 6 Practice Direction B (formerly Civil Procedure Rules Part 6) codifies English courts' jurisdiction to serve on a foreign defendant. See also *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran (Service Outside Jurisdiction)* [1994] 1 AC 438.
[37]*Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] SGCA 89; [1999] 3 SLR(R) 1156; *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] SGCA 44; [2014] 4 SLR 500, [26].
[38][1987] AC 460.

The burden of showing that the case is a proper one for service out of jurisdiction lies with the plaintiff. This is an acknowledgement that "the exercise of jurisdiction by the Singapore courts over a foreign defendant is, in a real sense, an imposition on him".[39]

Relevantly, even where there is a choice of court agreement between the parties submitting their disputes to the Singapore High Court, leave of court to serve on a foreign defendant is still required,[40] unless there is contractual provision for a means of service of process in Singapore.[41] Where such contractual provision has been made, it is a case of service within jurisdiction. In other words, the presence of a Singapore choice of court agreement (whether exclusive or non-exclusive), under the traditional, pre-SICC framework, does not obviate the need to obtain leave of court for service of legal process abroad. This underlines the traditional attitude towards service out of jurisdiction being extraordinary and courts are accordingly to exercise caution.

The exclusivity of the choice of court agreement would, however, affect the applicable principles to establish that the Singapore High Court is the proper forum for the trial of the claim. Where the choice of court agreement is exclusive in nature, the *Spiliada* test is displaced and instead, the "strong cause" test[42] will be applied. Essentially, the court will uphold the parties' agreement, unless the party who is in breach of contract is able to show exceptional circumstances amounting to strong cause against the enforcement of the agreement. Where the choice of court agreement is non-exclusive in nature, its effect would depend on whether Singapore is the chosen forum. Where the chosen forum is a foreign court, the *Spiliada* test would be applicable and the choice of court agreement is one of the factors to be considered under the test.[43] Where Singapore is the chosen forum and Singapore law is the proper law of the contract, to succeed in a stay application before the Singapore court, the defendant must show "strong cause" as to justify the breach of the parties' agreement.[44] A strong pro-forum approach is adopted in relation to non-exclusive choice of court agreements for the Singapore court.

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[39] *Zoom Communications*, *supra* note 37, [72], citing *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch D 239, 242–43. See also *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50, 65 (Lord Diplock).

[40] A jurisdiction agreement is a basis of jurisdiction under Rules of Court, O 11, r 1(d)(iv) and O 11, r 1(r).

[41] Rules of Court, O 10, r 3.

[42] *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814, [83]–[85]; *Vinmar Overseas (Singapore) pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271.

[43] *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16; [2012] 2 SLR 519, [25]. The case concerned a non-exclusive choice of court agreement in favour of Hong Kong courts.

[44] *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, [88].

2. *The SICC regime*

According to section 18D of the SCJA,[45] the SICC shall have jurisdiction to hear a dispute where:

(a) the action is international and commercial in nature;
(b) the action is one that the High Court may hear and try in its original civil jurisdiction;
(c) the action satisfies such other conditions as the Rules of Court may prescribe.

The Rules of Court, the subsidiary legislation to the SCJA, defines the terms "international" and "commercial" widely.[46] Remarkably, the parties to the claim may expressly agree that the subject-matter of the claim is "international"[47] or "commercial"[48] in nature.

The Rules of Court further provide that there are two main ways[49] in which the SICC may be seised of jurisdiction. First, where the parties have submitted to the SICC's jurisdiction under a written jurisdiction agreement.[50] Second, where the case has been transferred from the High Court to the SICC.[51] The SICC also has jurisdiction over third parties who have been joined to the proceedings that have been brought before the SICC through either of the aforesaid avenues.[52] Our article, given its objectives, shall not discuss the SICC's jurisdiction over third parties,[53] save to note that the joinder procedure enhances the SICC's appeal as a dispute resolution forum. Further, as space constraint does not permit a comprehensive exposition of the SICC's jurisdictional rules,[54] we focus on analysing these rules' impact on Singapore private international law.

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[45]Cap 322, Rev Ed 2007.
[46]Rules of Court, O 110, rr 2(a) and (b).
[47]*Ibid*, r 2(a)(iv). A claim is considered of "international" nature if "the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one state". A case may also be classified as "international" if parties' places of business are in different States or none of the parties' places of business are in Singapore (see r 2(a)(i)–(iii)).
[48]*Ibid*, r 2(b)(iii).
[49]The SICC has jurisdiction to hear an originating summons issued under O 52 of the Rules of Court for leave to commit persons for contempt in respect of any SICC judgment or order.
[50]Rules of Court, O 110, r 7.
[51]*Ibid*, rr 12(3B) and (4).
[52]*Ibid*, r 9.
[53]See discussion in M Yip, "The resolution of disputes before the Singapore International Commercial Court" (2016) *65 International and Comparative Law Quarterly* 439, 464–65.
[54]See, for eg, Yeo TM, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC", Eighth Yong Pung How Professorship of Law Lecture 2015 (http://law.smu.edu.sg/sites/default/files/law/CEBCLA/YPH-Paper-2015.pdf accessed on 18 September 2018); Yip, *ibid*.

(a) *Written jurisdiction agreement: party autonomy and forum-shopping*

Where the parties submit by a written jurisdiction agreement to the SICC, Order 110, rule 6(2) of the Rules of Court expressly waives the requirement to obtain leave of court for service of process on a foreign defendant. Existence of jurisdiction is easily established in claims where parties have submitted to the SICC under a written jurisdiction agreement. As provided under Order 110, rule 7 of the Rules of Court, the other requirements are simply that the claim (as it was first filed) is of an international and commercial nature and that the parties are not seeking any form of prerogative relief. The principles for determining exercise of jurisdiction are also significantly altered under the SICC regime, with the aim of favouring the SICC resolving the claim. Order 110, rule 8 of the Rules of Court sets out the SICC principles:

> (1) Subject to paragraph (2), the Court may decline to assume jurisdiction … if it is not appropriate for the action to be heard in the Court.
> (2) The Court must not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written jurisdiction agreement between the parties.
> (3) In exercising its discretion under paragraph (1), the Court shall have regard to its international and commercial character.

Notably, Order 110, rule 8 does not distinguish between an exclusive jurisdiction agreement and a non-exclusive jurisdiction agreement.[55] Further, as has been pointed out, although the governing criterion to determine if the SICC should decline to assume jurisdiction over a claim is appropriateness, the

[55]S 18F(1)(a) read with 18F(2) of the SCJA provides that unless there is express provision to the contrary, the parties to an SICC jurisdiction agreement shall be "considered to have agreed to submit to the exclusive jurisdiction" of the SICC. It is unclear if the rebuttable presumption in S 18F(1)(a) applies if the contract is governed by foreign law instead of Singapore law (see Yeo, *supra* note 54, 9–10). If S 18F(1)(a) is a forum mandatory rule, it would apply regardless of the proper law of the contract. Yip, relying on party autonomy being the cornerstone of the SICC, argues that S 18F(1)(a) ought not be characterised as a forum mandatory rule, especially in view that the presumption may be rebutted by contrary wording (see Yip, *supra* note 53, 452–54). Cf A Chong, "Singapore: A Mix of Traditional and New Rules" in M Keyes (ed), *Optional Choice of Court Agreements in Private International Law* (Springer, forthcoming). Chong takes the contrary view that S 18F(1)(a) ought to be characterised as a forum mandatory rule on three bases. First, the general presumption against extraterritoriality of laws is rebutted in the case of the SICC as it is a court set up to hear disputes with international elements. Second, S 18F(1)(a) is inspired by Article 3(b) of the HCCCA, the latter of which has been implemented as S 3 (2) of the CCAA. Chong argues that S 3(2) of the Choice of Court Agreements Act 2016 is a forum mandatory rule. Finally, a forum mandatory rule characterisation would ensure consistency in approach between SICC/non-CCAA jurisdiction agreements and SICC/CCAA jurisdiction agreements.

concept in the context of Order 110, rule 8 is in need of more precise definition.[56] However, Order 110, rule 8(2) is instructive that foreign connections of the claim do not by themselves furnish basis for the SICC to refuse to assume jurisdiction. After all, the SICC was created to attract more judicial business to Singapore, and it is envisaged that the increase in volume would come from disputes that are not substantially connected to Singapore. To put it simply, the game plan is to make Singapore the forum of choice, to overcome the fact that it is not the natural forum.

What is beyond doubt, therefore, is that statutory intent and wording support the conclusion that there are very narrow grounds upon which the SICC may decline to assume jurisdiction once jurisdiction is established under Order 110, rule 7.[57] It is also clear that the traditional *Spiliada* test is irrelevant. The SICC Committee Report states that for jurisdiction founded on the basis of an exclusive jurisdiction agreement, the SICC "would ordinarily dismiss the application for a stay unless strong cause can be shown", without elaborating on what would amount to "strong cause" under the SICC regime.[58] Further, the SICC Committee Report proposes considering "amending the law" to deal with cases founded on non-exclusive jurisdiction agreements, although the Report does not go on to provide further guidance.[59] In *IM Skaugen SE v Man Diesel & Turbo SE*, Assistant Registrar Zhuang commented,[60] in obiter, that the phrase "not appropriate" under Order 110, rule 8(1) obliges the application of the Australian "clearly inappropriate forum" test, enunciated in *Voth v Manildra Flour Mills Proprietary Ltd*[61] (the "*Voth* test"), instead of the *Spiliada* test. It has been forcefully argued that the *Voth* test does not comport with the statutory language and intent.[62] The better view is that the phrase "not appropriate" under Order 110, rule 8(1) imports an autonomous concept, not identical with common law formulations of appropriate forum. However, it is clear that Assistant Registrar Zhang's comment proceeds from the understanding that the *Voth* test is functionally and methodologically different from the *Spiliada* test. The *Voth* test is said to be more restrictive and focused on the appropriateness of the local forum,[63] as opposed to the more comparative approach under the

[56]Yip, *supra* note 53, 456–60.
[57]Yeo, *supra* note 54.
[58]See *SICC Committee Report*, *supra* note 5, [26]. The Report states that "[f]orum non conveniens would not be an issue for consensual cases founded on an exclusive jurisdiction agreement, as the Singapore court would not allow the contesting party to breach its agreement".
[59]See *SICC Committee Report*, *supra* note 5, [27].
[60][2016] SGHCR 6, [145].
[61][1990] HCA 55; (1990) 171 CLR 538.
[62]K Chng, "Exploring a New Frontier in Singapore's Private International Law" (2016) 28 *Singapore Academy of Law Journal* 649.
[63]R Garnett, "Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?" (1999) 23 *Melbourne University Law Review* 30, 34.

Spiliada test.[64] If so, Assistant Registrar Zhuang's endorsement of the *Voth* test, whilst incorrect, does more generally emphasise that Order 110, rule 8 is meant to be more restrictive than the *Spiliada* test. In our view, and in line with Assistant Registrar Zhuang's sentiments, the choice of the word "inappropriate" under Order 110, rule 8(1) suggests a general disinclination for the SICC to refuse jurisdiction[65] and this may be justified on the basis that the parties have chosen the SICC to hear their dispute. After all, the SICC framework is undergirded by the principle of party autonomy. Further, the concept of "inappropriate", on its plain reading, need not be underlined by a comparative evaluation. The consideration is not framed as whether it is more appropriate for the High Court or a foreign court to hear the claim. Such a reading is also consistent with the clarification in Order 110, rule 8(2).

More importantly, the SICC rules in relation to jurisdiction based on a written jurisdiction agreement are clearly more liberal than the traditional rules discussed above. Leave of court has been dispensed with for cases involving service out of jurisdiction. This may involve no more than a gentle push beyond the traditional jurisdictional framework.[66] But this small extension reflects a clear change in attitude towards the exercise of extraterritorial jurisdiction, bringing to mind Lord Sumption's *obiter* comments in *Abela v Baadarani*:

> The characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of foreign power over the Defendant and a corresponding interference with the sovereignty of the state in which the process was serviced. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of *forum non conveniens* and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life … It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of efficient conduct of litigation in an appropriate forum.[67]

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[64]This conventional understanding of the *Voth* test has been vigorously challenged in A Arzandeh, "Reconsidering the Australian *Forum (Non) Conveniens* Doctrine" (2016) 65 *International Commercial Law Quarterly* 475.

[65]As we will suggest below, the force of this general disinclination for the SICC to refuse jurisdiction ought to vary depending on whether it is an exclusive jurisdiction agreement or a non-exclusive jurisdiction agreement.

[66]See discussion above at text to note 41 regarding Rules of Court, O 10, r 3. See also discussion below, text following note 74.

[67][2013] UKSC 44; [2013] 1 WLR 2043, [53]. Lord Sumption's obiter comments have attracted fierce criticisms for inconsiderately expanding English courts' jurisdiction: see

Briggs relied on Lord Sumption's *dictum* to suggest that under the English jurisdictional regime, the once-statutory jurisdictional gateways – presently contained in a Practice Direction – are in line to be rendered an oblivion ultimately, leaving the doctrine of *forum conveniens* as the sole requirement for service out.[68] Briggs' proposal was categorically rejected by Lord Sumption in the subsequent case of *Four Seasons Holdings Incorporated v Brownlie*.[69] Lord Sumption clarified that the crux of his protest in *Abela* was directed against "the importation of an artificial presumption against service out as being inherently 'exorbitant'" into the neutral exercise of construction of the jurisdictional gateways or application of the *Spiliada* test.[70] He stressed that he was not proposing an alternative test in *Abela*.

In view of Lord Sumption's clarification in *Brownlie*, the SICC approach has clearly pushed beyond the mode of liberality that Lord Sumption considers justified in *Abela*. The SICC framework is neither based on reciprocity amongst nations nor does it apply the common law doctrine of *forum non conveniens*. It regards party autonomy as a sufficient basis to justify Singapore taking jurisdiction.[71] Such an approach still broadly coheres with Lord Sumption's view that the modern approach to extraterritorial jurisdiction should be concerned with the efficient conduct of litigation in an appropriate forum. To generally uphold parties' choice of litigation forum ensures efficiency in dispute resolution, as both parties would (or could) have positioned themselves in advance for such a possibility. The salient features of the SICC, coupled with the parties' voluntary submission and the fulfilment of requisite formalities for the SICC clause to be operative,[72] greatly reduce the so-called imposition on a foreign defendant to make out his defence in the forum.

Further, the substantive purpose of service under the SICC regime, in view of the dispensation of court's leave to serve out, is arguably to give notification of the institution of proceedings including the essential elements of the claims. This is notwithstanding that the jurisdiction of the SICC (as with the High Court) is

A Dickinson, "Service abroad – an inconvenient obstacle?" (2014) 130 *Law Quarterly Review* 197. Cf Lord Sumption's clarification in *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80; [2018] 1 WLR 192, [31].

[68]A Briggs, "Service out in a shrinking world" (2013) *Lloyd's Maritime Commercial Law Quarterly* 415, 417–18.

[69][2017] UKSC 80; [2018] 1 WLR 192, [31], noted I Bergson and J Folkard, "Service in the Supreme Court" (2018) 134 *Law Quarterly Review* 344.

[70]*Ibid*.

[71]The SICC rules are, however, similar in some respects to the jurisdictional rules under the Hague Convention on Choice of Court Agreements 2005, even for cases which do not fall under the scope of the HCCCA (see discussion in Part D).

[72]Unlike the common law approach on validity, an operative SICC clause under the SICC regime is one that is "written", which is defined in Rules of Court, O 110, r 1(2)(e) to mean that the contents are recorded in a form that is "accessible so as to be useable for subsequent reference".

conferred and defined by section 16 of the SCJA which, on present drafting, clearly states that service creates personal jurisdiction.[73]

There is nevertheless no real inconsistency between the SICC regime and section 16 of the SCJA. First, the SICC's rules cohere with the Singapore court's views, expressed even with respect to previous iterations of section 16 of the SCJA which did *not* expressly refer to submission, that submission to the court's jurisdiction by the defendant confers jurisdiction to the court.[74] Secondly, Order 10, rule 3 of the Rules of Court, which covers non-SICC claims, already allows for service as of right where a mode of service within Singapore pursuant to the choice of court agreement for Singapore has been stipulated. That leave of court is required in relation to a foreign defendant when a mode of service outside Singapore has been agreed on or the agreement is silent as to how service is to be effected is rather anomalous. In all these cases, the parties have chosen Singapore to be the forum but merely differ as to how notice is to be effected. Order 110 rule 6(2) thus goes some way towards rectifying this state of affairs. Thirdly, a strong parallel may be made with the common law and Brussels Ia Regulation / Lugano Convention ("Brussels Regulations") regimes applied in the English courts. As Briggs explains, with reference to the English system:

> There are, therefore, two kinds of service: that which creates and defines jurisdiction, and that which notifies the pre-existence of jurisdiction. Though each serves an important function, each operates within the confines of a coherent, self-contained system, and takes its colour from its surroundings … The nature of European jurisdiction is statutory, in the sense that the legislator lays down a number of rules which tell a judge whether he or she has judicial jurisdiction. These rules are neither defined by reference to service of process, which in this context is reduced to a matter of pure procedural law only, nor framed as including a discretion.[75]

There remains the further question of whether dispensing with the *Spiliada* test or "strong cause" test, a sufficient safeguard in Lord Sumption's view for the court's exercise of extraterritorial jurisdiction, is appropriate. The pertinent consideration

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[73]The SICC regime provides cause for reflection as to why the court's leave for service abroad should not similarly be abrogated in respect of cases commenced in the High Court involving forum jurisdiction clauses. This issue harks back to the traditional notion of exercise of "exorbitant" jurisdiction. Notably, the Singapore courts had observed, pre-SICC, that service out of Singapore performs the function of notification of proceedings, as opposed to an act of interfering with the foreign state's sovereignty. See, for eg, *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd* [2000] SGCA 24, [2000] 1 SLR(R) 962, [30]; *ITC Global Holdings Pte Ltd (in liquidation) v ITC Ltd* [2011] SGHC 150, [41].

[74]*Indo Commercial Society (Pte) Ltd v Ebrahim*, unreported, 31 October 1986. Cf *Indo Commercial Society (Pte) Ltd v Ebrahim* [1992] SGHC 230; [1992] 2 SLR(R) 667, [44]–[51].

[75]A Briggs, "The hidden depths of the law of jurisdiction" (2016) *Lloyd's Maritime and Commercial Law Quarterly* 236, 238–39.

is whether these common law principles are the only proper approach to determine "proper forum". Here, the parallel with the English system is weaker. Unlike the Regulations regime which is applicable to all member States of the European Union and thereby fostering a foundation of mutual trust and cooperation, there is no reciprocal basis for the operation of the SICC regime.[76] Where an exclusive jurisdiction agreement is concerned, the SICC regime may nevertheless be justified on the basis that the strong contract enforcement stance is equally evident in the common law "strong cause" test. The same, however, cannot be said in respect of the SICC's treatment of non-exclusive jurisdiction agreements. Order 110, rule 8 of the Rules of Court does not apparently distinguish between an exclusive jurisdiction agreement and a non-exclusive jurisdiction agreement. The point of a (simple) non-exclusive jurisdiction agreement is that parties may sue in different fora, even though it is agreed that the contractually-chosen forum is an appropriate forum. Notably, the presumption of exclusivity under section 18F of the SCJA does not apply where the parties have explicitly intended for the jurisdiction agreement to be non-exclusive.

Do the SICC jurisdictional rules relating to non-exclusive jurisdiction agreements pay sufficient respect to parties' choice and international comity? In respect of parties' choice, an easy response would be that parties who choose, even non-exclusively, to submit to the SICC would understand the full legal implications of their choice, including that the SICC regime, on issues of existence and exercise of jurisdiction, does not generally distinguish between an exclusive jurisdiction agreement and a non-exclusive jurisdiction agreement. As highlighted above, the SICC Committee Report has proposed "amending the law" for cases involving non-exclusive jurisdiction agreements. An undifferentiated approach is not implausible. However, it is overly simplistic and forum-biased. In practice, non-exclusive jurisdiction clauses vary in drafting and thus the legal effect. The only commonality between different kinds of non-exclusive jurisdiction clauses is that they do not have the element of derogation that is entailed in an exclusive jurisdiction agreement.[77] Accordingly, respect for party autonomy, which the SICC regime so clearly embraces, would demand an interpretation of "inappropriate" in Order 110, rule 8 of the Rules of Court to encompass a calibrated approach, bearing different thresholds depending on the specific content of each clause and the context of each case.[78] Setting aside the unique circumstances of each case, it is suggested that the disinclination to refuse jurisdiction should apply, with diminishing force, to: an exclusive jurisdiction agreement, a deemed exclusive jurisdiction agreement, and a non-exclusive jurisdiction agreement. In the last category,

[76]Except in the context where the HCCCA applies, on which see Part D.
[77]See further Yeo TM, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 *Singapore Academy of Law Journal* 306, 337–52; A Briggs, "The subtle variety of jurisdiction agreements" (2012) *Lloyd's Maritime and Commercial Law Quarterly* 364, 375–76.
[78]See Yip, *supra* note 53, 457.

the strength of this starting point would vary according to the specific wording of the non-exclusive jurisdiction agreement.

As for concerns of international comity, two arguments may be made. First, the traditional common law *forum non conveniens* principles are regarded in Singapore as being crafted based on the common law's view of jurisdiction allocation and what amounts to sufficient respect for international comity.[79] Most civilian countries do not share the same views. Even within the common law world, the Australian approach – which applies the "clearly inappropriate forum" test – differs in some degree from the English common law approach which has been followed by Singapore law.

Secondly, the *Spiliada* test was developed in an age of skepticism of forum-shopping, marked by a general unwillingness to overtly compare between legal systems. We are now in a time of "increasing globalization of legal disputes".[80] We must recognise that not all forms of forum-shopping are bad.[81] To sue in a contractually agreed forum, even if non-exclusively chosen, cannot be reproachable forum shopping.[82] The legal expertise, reputation and procedural features of a forum are, in reality, equally important considerations for litigants[83] as factors of convenience[84] and cost. Moreover, in an age where major legal jurisdictions are marketing their judicial expertise and legal systems, it would appear slightly hypocritical to say that the modern understanding of "proper forum" cannot take into account merits of the forum court. These arguments operate with the greatest force where parties have specifically chosen the SICC. It may also be relevant to note that the SICC rules, which adopt a moderately forum-biased view of "proper forum", avoids an outright comparison of the merits of the competing legal systems.

(b) *Transfer from the High Court to the SICC*

The second main avenue through which cases come before the SICC is by way of transfer of proceedings from the High Court pursuant to Order 110, rules 12(3B) and (4) of the Rules of Court.[85] According to Order 110, rule 12(4) of the Rules of Court, a dispute may be transferred from the High Court to the SICC if:

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[79] *The "Rainbow Joy"* [2005] SGCA 36; [2005] 3 SLR(R) 719, [18].

[80] This phrase is taken from D Foxton, "Foreign Law in Domestic Court" (2017) *Singapore Academy of Law Journal* 194, 196.

[81] See AG Slater, "*Forum non conveniens*: a view from the shop floor" (1988) 104 *Law Quarterly Review* 554, 560–62.

[82] Indeed, it is generally acknowledged that international comity plays a reduced role where parties have made a choice of forum.

[83] Slater, *supra* note 81, 561. See also discussion of our survey results under Part B.2.

[84] Slater (*ibid*) has pointed out that "[c]onvenience embraces a wide range of factors such as the availability of legal and technical expertise, communications and other services". However, the *Spiliada* version of "convenience" is far narrower so as to avoid the politically sensitive exercise of comparing of legal systems.

(i) It concerns international and commercial claims;
(ii) The parties are not seeking any form of prerogative relief;
(iii) It is more appropriate for the case to be heard in the SICC; and
(iv) Either all parties consent to the transfer or the High court orders the transfer on its own motion after hearing the parties.

If the dispute falls within the HCCCA regime, the transfer jurisdiction is set out under Order 110, rule 12(3B) which provides for the same requirements as rule 12(4), save that no transfer can be made unless all parties consent to the transfer, whether the transfer is initiated by a party's application or on the High Court's own motion. We will analyse this difference in relation to parties' consent in Part D.

The transfer jurisdiction is generally concerned with the internal allocation of jurisdiction between the High Court and the SICC,[86] which falls outside the scope of this article that is focused on the conflict of laws issues. The exercise of transfer jurisdiction may however raise a conflict of laws issue in one situation: where the question of transfer of proceedings commenced as of right is raised at the jurisdictional stage before the High Court has determined if it would exercise jurisdiction and the defendant resists having the claim heard in Singapore, whether in the High Court or the SICC.[87] The issue of transfer may be raised on the High Court's own motion or pursuant to one party's application.[88] In such circumstances, the conflict of laws issue is whether the possibility of a transfer of the proceedings to the SICC is a relevant factor in deciding if Singapore is a distinctly more appropriate forum (the *Spiliada* test) than the forum to which the defendant is amenable which the defendant asserts is more appropriate.[89] Notably, this issue arises in the context of the SICC's non-consensual jurisdiction. The Singapore Court of Appeal considered this question in the recent case of *Rappo v Accent Delight International Ltd* ("*Accent Delight*").[90]

Accent Delight concerned an application to stay proceedings in Singapore. The defendants argued that Switzerland and/or Monaco were more appropriate fora to adjudicate the claims than Singapore. In particular, the plaintiffs' main claims against the defendants were founded in equity, and these equitable claims

[85]In the SICC's early years, it is expected that this will be the primary way through which disputes will be brought before the SICC.
[86]See generally Yip, *supra* note 53, 461–64.
[87]Where all parties to the dispute consent to the transfer of proceedings to the SICC, the transfer will be made, unless the claim is not substantively international or commercial in nature or if some form of prerogative relief is being sought by one of the parties.
[88]The plaintiff may apply for the transfer of proceedings to the SICC for strategic reasons, as a dilatory tactic or to increase the prospects of persuading the Singapore court to hear the case.
[89]*Siemens AG v Holdrich Investment Ltd* [2010] SGCA 23; [2010] 3 SLR 1007, *JIO Minerals FZC v Mineral Enterprises Ltd* [2010] SGCA 41; [2011] 1 SLR 391.
[90][2017] SGCA 27; [2017] 2 SLR 265.

would not be recognised by Swiss or Monegasque courts, though they might be recharacterised as causes of actions in tort, contract or unjust enrichment. The High Court requested the parties to submit on the suitability of transfer of proceedings to the SICC.[91] It disagreed with the defendants, who objected to the transfer, that the question of transfer should only be dealt with after the stay application had been dismissed.

In the Court of Appeal, Menon CJ (delivering the judgment) held that "[t]he presence of the SICC and its capabilities are potentially relevant to the [*Spiliada*] analysis".[92] He illustrated this with the example of the possibility of determining a question of foreign law based on submissions instead of proof in SICC proceedings.[93] This feature of the SICC would reduce costs. Further, the governing law being foreign law "should carry less weight in the *forum non conveniens* analysis if the Singapore courts, through their International Judges in the SICC, are familiar with and adept at applying that foreign law".[94] Menon CJ, however, stressed that the capabilities of the SICC and the possibility of transfer are one factor, albeit an important one, in the *forum non conveniens* analysis.[95] To rely on the possibility of transfer to the SICC, the plaintiff must articulate the relevant quality of the SICC and prove that the dispute "is of a nature that lends itself to the SICC's capabilities".[96] It would be unnecessary for the court to make a conclusive determination on the question of transfer at the jurisdictional stage; it would suffice for a prima facie determination to be made.[97]

This represents a broadening of the range of factors that can be considered under the *Spiliada* framework. Although Menon CJ clarified that the presence of the SICC and the possibility of transfer of proceedings (the "SICC factor") would not lead to every case being retained in Singapore,[98] the possibility of such a submission would add a string to the plaintiff's bow to defeat the defendant's stay application. This *Accent Delight* approach was extended in a later High Court decision, *IM Skaugen SE v MAN Diesel & Turbo Se* ("*IM Skaugen (HC)*").[99] In that case, the tort claim (misrepresentation) was governed by German law. The competing jurisdictions were Singapore, Germany and Norway. The defendants, in favour of having the claim heard in Germany, argued that a German court would be best placed to apply German law. They

[91] *Accent Delight International Ltd v Bouvier, Yves Charles Edgar* [2016] SGHC 40; [2016] 2 SLR 841, [111].
[92] *Accent Delight*, *supra* note 90, [116]. The Court of Appeal's decision affirmed an earlier decision by Assistant Registrar Zhuang in *IM Skaugen*, *supra* note 60.
[93] *Accent Delight*, *supra* note 90, [122]. See further *Sinco Techonologies Pte Ltd v Singapore Chi Cheng Pte Ltd* [2017] SGHC 234, [64-67].
[94] *Accent Delight*, *supra* note 90, [122].
[95] *Ibid*, [123].
[96] *Ibid*, [124].
[97] *Ibid*.
[98] *Ibid*, [123–24].
[99] [2018] SGHC 123.

further argued that this advantage could not be neutralised by transfer of proceedings to the SICC, as there was no German International Judge on the SICC panel. The High Court disagreed. It said that the SICC procedural rules allow a question of foreign law to be determined by submissions as opposed to proof, thus reducing time and expense in pleading issues of foreign law.[100] Further, the Court said that there were SICC International Judges from civil law jurisdictions equipped "with the necessary skills and experience to deal with German law here".[101] The Court highlighted the Japanese International Judge as one such candidate, pointing out that the Japanese Civil Code had been historically influenced by the German Civil Code.[102] Remarkably, the Court said that one factor pointed in favour of the SICC hearing the claim – the case concerned factual and legal connections that were distributed across various "diverse and geographically divided" jurisdictions.[103] This made it "the archetypal dispute which might be better dealt with by an international panel of judges, as is available under the SICC, than by the judges of any one jurisdiction".[104] This case is going on appeal before the Singapore Court of Appeal.

Three points regarding the more nuanced *Spiliada* test merit highlighting. The first point concerns the weight of the SICC factor. Courts should bear in mind that the perceived advantages of having the case heard in the SICC, if transfer of proceedings is made, may ultimately not materialise. A number of the capabilities of the SICC are subject to the SICC's approval. The most appropriate International Judge[105] may be unavailable or precluded by reason of a conflict of interests. The proper weight ascribed to the SICC factor should account for these uncertainties.

Secondly, the more nuanced *Spiliada* test could hasten the emergence of a trend of directly comparing the merits of the competing legal systems in the age of international commercial courts.[106] The traditional *Spiliada* evaluation deprecates invidious comparison of procedural advantages available in the competing fora, unless the court is satisfied by reason of their unavailability that substantial

[100] *Ibid*, [214].
[101] *Ibid.*
[102] *Ibid.* Cf *Sinco Technologies Pte Ltd v Singapore Chi Cheng Pte Ltd* [2017] SGHC 234, [66]. The claim was found to be governed by Chinese law. The Singapore High Court did not think a transfer to SICC was appropriate because the case was not "international"; there is no International Judge who is familiar with or well versed in Chinese law; and documents were largely in Chinese.
[103] *IM Skaugen (HC)*, *supra* note 99, [216].
[104] *Ibid.*
[105] The International Judge factor is not crucially relevant in a case where the dispute is not centred on issues of law, but this would mean that, in the absence of other factors, there is no particular advantage of having the claim heard elsewhere as well.
[106] The comparative exercise is the precise reason the Australian courts have turned away from the *Spiliada* test: see J Epstein, "Australia" in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford University Press, 1995), 87.

justice would not be done in the available appropriate forum.[107] If, however, the modern objective of the ad hoc jurisdiction allocation exercise is – consistent with Lord Sumption's obiter sentiments in *Abela* – centrally concerned with the courts' ability to hear a claim in an efficient and fair manner, the level of deference to foreign legal systems is not an inflexible standard. Relevantly, English judges are increasingly more openly critiquing foreign systems in cases where there is a real risk, supported by cogent evidence, that the plaintiff may not be able to obtain justice abroad.[108] Of course, a preference for the SICC can still be couched in the familiar language of convenience and costs, a core aspect of forum appropriateness under the *Spiliada* test, but that is really formal reasoning. On the basis that a direct comparison of the competing fora is acceptable, could one argue that the foreign court is better able to decide a dispute governed by foreign law than an International Judge of the SICC, trained in that foreign law, but who may have retired from judicial service? This relates to the reasonable expectations that one may have regarding the proof of foreign law and a forum court applying foreign law. According to Fentiman, one is not expecting that the process will generate the correct result but one does expect that the process is "authentic, capturing the assumptions, reasoning and idiom of the foreign forum".[109] In a majority of the cases at least,[110] the appointment of an International Judge trained in the foreign law would better enable the approximation of the process of having the dispute heard in the relevant foreign court. On this point, the *IM Skaugen (HC)* decision might require fuller consideration. Although the Japanese Civil Code is heavily influenced by the German Civil Code in many respects, there are nonetheless differences between the two legal systems, in particular, Japanese tort law is closer to the French Code.[111] As such, greater attention would need to be paid to the precise similarities between Japanese law and §826 of the German Civil Code – the agreed applicable provision under German law – before arriving at any firm conclusion that the appointment of a Japanese judge

[107] *Spiliada*, *supra* note 38, 482.

[108] See *Deripaska v Cherney* [2009] EWCA Civ 849, [2009] 2 CLC 408, [24–45], [56–67]; *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 11, [2011] 4 All ER 1027 [88–102], [139–51].

[109] See R Fentiman, *Foreign Law in English Courts: Pleading, Proof and Choice of Law* (Clarendon Press, 1998), 20.

[110] More uncommonly, however, a retired foreign judge's views may no longer represent the prevailing views of the current foreign forum. Recent developments on equitable compensation for breach of trust are illustrative. Compare Lord Millett's views in the Hong Kong Court of Final Appeal decision in *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368 with the UK Supreme Court's decision in *AIB Group (UK) Plc Ltd v Redler* [2014] UKSC 58, [2014] 3 WLR 1367.

[111] Hiroshi Oda, *Japanese Law*, 3rd edn (OUP, 2009), 181. The general section under the Japanese Civil Code which deals with tort liability is Article 709, which is based on the French Civil Code 1382. We would like to thank Dr Wu Ying Chieh for clarifying the comparative materials.

to hear the case would neutralise the advantages of having the case heard in the German court.

Finally, the more nuanced *Spiliada* test may have unlocked the door[112] to considering more generally the reputation and acknowledged expertise of the specialist courts. Menon CJ certainly did not go that far in *Accent Delight*. But the High Court's comments in *IM Skaugen (HC)* that the SICC is more appropriate than an ordinary domestic court to try a case with diverse international connections come very close to that. Such a development may draw support from the "*Cambridgeshire*" factor, a significant consideration in the traditional *Spiliada* test. The "*Cambridgeshire*" factor relates to the knowledge and experience built up on both sides and by the presiding judge in dealing with the same or similar issues of great complexity arising in another set of proceedings. If we extend the logic underlining the "*Cambridgeshire*" factor, it is strongly arguable that the niche expertise of a specialist court in dealing with a certain kind of complex litigation may be relevant in the *Spiliada* analysis.[113] The more important question is what niche expertise may count as a factor. Returning to *IM Skaugen (HC)*, the proposition that the SICC may appoint International Judges to hear cases with diverse international connections therefore makes it the more appropriate forum is not particularly persuasive. Whilst we agree that a more international coram composition will ensure a better understanding of the international elements of the claim, not all international connections are relevant to the same degree to the resolution of the dispute. In fact, the high threshold which is required to be satisfied before the *Cambridgeshire* factor can be successfully raised was emphasised by the Court itself.[114] The merits of this point will need to be revisited on appeal.

The more nuanced *Spiliada* test appears to be a response to the SICC Committee Report's proposal to consider whether "the traditional *Spiliada* test … remains modern and relevant to the SICC" in the context of the SICC's non-consensual jurisdiction.[115] Whilst there are good reasons for modernising the traditional *Spiliada* test in light of the establishment of the SICC, we caution against going too far. It would give the unintended impression that the creation of the SICC would now make it unduly difficult for parties to argue that a foreign forum is clearly more appropriate in resolving the dispute.[116] If the ethos of the SICC framework is to

[112]Cf *Amin Rasheed*, *supra* note 39, 67–68 where Lord Diplock said that the popularity of the Commercial Court in London with foreign litigants and the "unrivalled expertise" of its judges in the resolution of commercial disputes did not justify treating it as any more than a national court. His Lordship stressed that cases where parties had chosen the English court by a jurisdiction clause must be distinguished from cases where the parties had not, as the latter cases involved an exercise of "exorbitant jurisdiction" over unwilling defendants.

[113]The same argument cannot be made in respect of specialist courts with *general* international commercial litigation experience and expertise.

[114]*IM Skaugen (HC)*, *supra* note 99, [240–47].

[115]SICC Committee Report, *supra* note 5, [27].

[116]In fact, the Singapore proceedings were stayed in *Rappo v Accent Delight International Ltd* [2017] SGCA 27; [2017] 2 SLR 265.

uphold party autonomy, the application of the *Spiliada* test in cases of non-consensual jurisdiction must equally respect the parties' decision (where this is provable) not to choose Singapore courts as the dispute resolution forum.

One further and related point merits mention, before we turn to consider the implementation of the HCCCA in Singapore. Although this article is not generally concerned with the rules on internal allocation of jurisdiction between the SICC and the High Court, we propose that the more nuanced *Spiliada* test, on our analysis, could pave the way for a sensible interpretation of the requirement of "appropriateness" for transfer of proceedings under either Order 110, rule 12(3B) or rule 12(4). It has been pointed out elsewhere that the concept of "appropriateness" under the rules is unclear.[117] In our view, the international elements of the case and their relevance to the resolution of the dispute, the SICC's capabilities in catering for the international elements of the case and parties' consent to a transfer of proceedings[118] ought to be relevant factors in deciding whether it is *more appropriate* for the case to be heard in the SICC as compared with the High Court. The exercise is necessarily comparative. Where the question of transfer is raised at the jurisdictional stage before the High Court has determined its international jurisdiction and the defendant is asking for a stay of Singapore proceedings (which is the scenario examined above), most of these factors (save for parties' consent) would have been considered in the *Spiliada* test. The outcome under the *Spiliada* analysis would generally have a strong bearing on the question of appropriateness for the purpose of ordering transfer of proceedings. Where such a conflict of laws issue does not arise,[119] the aforementioned factors can be straightforwardly considered in the inquiry on appropriateness under Order 110 rule 12(3B) or rule 12(4).

The concept of "appropriateness" for the purposes of the internal allocation of jurisdiction between the SICC and the High Court is clearly a different creature from the concept of "inappropriateness" which is used when the SICC is determining whether to decline jurisdiction. The former, as discussed above, involves determining whether the features and capabilities of the SICC or those of the High Court best suit the case at hand. The latter, on the other hand, arguably does not involve a comparative exercise at all.[120] Even if it were the case that an element of comparison is required under Order 110 rule 8(1), the comparison would be between two sovereign courts and the angle taken to that comparative exercise

[117]Yip, *supra* note 53, 467.

[118]This factor is relevant to the discretionary exercise under Order 110 rule 12(4), as the High Court may order transfer of proceedings on its own motion, without having obtained all parties' consent. Given our argument that the SICC framework is underlined by party autonomy, we argue that if a majority of the parties consent to the transfer, this would make it a more appropriate case for transfer, as compared with a case where only a minority of the parties consent to the transfer.

[119]For example, the defendant may wish for the claims to be heard in Singapore, but by the High Court instead of the SICC.

[120]See discussion above at text following note 64.

would be different from that taken in relation to Order 110 rule 12(3B) or rule 12 (4). In particular, as is made clear in Order 110 rule 8(2), international connecting factors *alone* would not justify the SICC declining to assume jurisdiction, precisely because the SICC has the capacity to deal with disputes with international elements. International connecting factors coupled with evidence to show that the claim is clearly not commercial in nature might constitute a possible ground on which the SICC may decline to assume jurisdiction. By contrast, international connecting factors (to the extent that they are relevant to resolving the issues in dispute in the case) could render the case more appropriate to be heard in the SICC than in the High Court.

D. Choice of Court Agreements Act 2016

Having considered the SICC's features and jurisdictional rules, we now move on to examine the other significant, and related, private international law development: Singapore's ratification of the HCCCA. To date, the HCCCA has also entered into force in Mexico, Montenegro and the European Union Member States, including belatedly, Denmark. China, the US, and Ukraine have signed, but not ratified the Convention.[121]

According respect to party autonomy in relation to a choice of court agreement of course forms the thrust of the HCCCA. The HCCCA operates on three core principles.[122] First, the chosen court must hear the case. Secondly, the non-chosen court must refuse to hear the case. Thirdly, a judgment from a chosen court must be recognised and enforced in other Contracting States.

When assessing whether Singapore ought to sign up to the HCCCA, the Law Reform Committee had recommended a wait and see attitude in 2013, on grounds that adopting the Convention did not bring immediate significant practical benefits to Singapore.[123] Once the HCCCA came into force and the SICC was set up, signing up to the Convention was a natural move to take.[124] As the results of the Queen Mary survey and our survey indicate, enforceability of outcome is

[121]The status table is available at www.hcch.net/en/instruments/specialised-sections/choice-of-court accessed on 18 September 2018. Although Canada has not ratified the HCCCA, Ontario has recently enacted the International Choice of Court Agreements Convention Act 2017, to give effect to the the HCCCA in anticipation of Canada's ratification.

[122]Subject to certain exceptions.

[123]TM Yeo, "Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005 (March 2013)", http://www.sal.org.sg/Portals/0/PDF%20Files/Law%20Reform/Report%20of%20the%20Law%20Reform%20Committee%20on%20the%20Hague%20Convention%20on%20Choice%20of%20Court%20Agreements%202005.pdf accessed on 18 September 2018.

[124]See The Honourable Chief Justice Sundaresh Menon, "Response by Chief Justice Sundaresh Menon" Opening of the Legal Year 2016 (11 January 2016), [18], http://www.supremecourt.gov.sg/Data/Editor/Documents/Response%20by%20CJ%20-%20Opening%20of%20the%20Legal%20Year%202016%20on%2011%20January%202016%20

one of the top considerations for parties when choosing the mode of and forum for dispute resolution. By enacting the HCCCA, the enforceability of Singapore judgments abroad, at least where Singapore is the chosen forum, is enhanced.

The implementing legislation is the Choice of Court Agreements Act 2016 ("CCAA"). It can be taken that the Hartley and Dogauchi Report[125] will be highly persuasive in the Singapore court in relation to the interpretation of the Convention; in the one case to date to be decided under the CCAA, the court referred extensively to the Report.[126] The focus in this section will be on how the CCAA fits in with the existing jurisdictional framework and whether wider enforceability of SICC judgments will be ensured.

1. *The relationship between the CCAA and the SICC*

While the motivation for the Singapore government to ratify the HCCCA was the establishment of the SICC, not all SICC cases will fall within the scope of the CCAA.

The CCAA applies in international cases to exclusive choice of court agreements in favour of the "courts, or one or more specific courts, of one Contracting State to the exclusion of the jurisdiction of any other court"[127] in civil or commercial matters. While Contracting States have the option of extending the scope of the HCCCA to non-exclusive choice of court agreements,[128] Singapore did not do so. The SICC, however, can assume jurisdiction on the basis of both exclusive and non-exclusive choice of court agreements. Even if the SICC assumes jurisdiction on the basis of an exclusive choice of court agreement, it is not a given that the case will be covered by the CCAA. Asymmetrical choice of court agreements will likely be considered as exclusive for the purposes of the SICC regime,[129] but is not so under the CCAA.[130] Further, while both the SICC and the CCAA cover

(Checked%20against%20Delivery%20110116).pdf accessed on 18 September 2018. Singapore signed the HCCCA on 25 March 2015.

[125]T Hartley and M Dogauchi, *Explanatory Report: Convention of 30 June 2005 on Choice of Court Agreements* (https://www.hcch.net/en/publications-and-studies/details4/?pid=3959 accessed on 18 September 2018) ("Hartley and Dogauchi Report").

[126]*Ermgassen v Sixcap Financials* [2018] SGHCR 8. See also *Shi Wen Yue v Shi Minjiu* [2016] SGHCR 8, [16] (overruled on unrelated grounds: [2016] 4 SLR 911).

[127]CCAA, s 3(1)(*b*).

[128]Art 22.

[129]This is certainly the case at common law: *Evans Marshall & Co v Bertola SA* [1973] 1 WLR 349, 361.

[130]This not beyond doubt after *Commerzbank AG v Liquimar Tankers Management Inc* [2017] 1 WLR 3497. However, the Hartley and Dogauchi Report, *supra* note 125, [32], [105]–[106] and [249], clearly states that assymetrical choice of court agreements are not exclusive for the purposes of the HCCCA. It is very likely that the Singapore courts would follow the Hartley and Dogauchi Report's position on this point. See also TM

commercial claims, the CCAA,[131] but not the SICC,[132] also covers civil but non-commercial claims. In addition, one of the gateways to both the CCAA and the SICC is that the case or claim must be international, but the two regimes adopt different definitions of "international". For jurisdictional purposes, the CCAA views a case as being international unless the facts relevant to the dispute and the connections and relationship of the parties are connected only with one Contracting State apart from a choice of a court of another Contracting State.[133] This is a very wide definition of "international" but it may be said that the SICC adopts an even more generous approach: under the SICC's rules, the parties may expressly agree that the subject-matter of the claim relates to more than one State, which thereby renders the claim "international" in nature.[134] Cases which are essentially domestic in nature could therefore pass one of the threshold requirements for invoking the SICC's jurisdiction,[135] but will not fall within the scope of the CCAA. Thus, "[n]ot every Convention case will be an SICC case, and not every SICC case will be a Convention case".[136]

2. *Jurisdiction for cases falling within the scope of the Choice of Court Agreements Act 2016*

If there is an exclusive choice of court agreement for the Singapore court and the matter falls within the scope of the CCAA, the Singapore court can only refuse to hear the dispute if the agreement is null and void under the law of Singapore.[137] In addition, the Singapore court cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. This precludes the court from considering the issue of *forum non conveniens*.[138] The restrictive bases

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Yeo, "Scope and Limits of Party Autonomy under the Hague Convention on Choice of Court Agreements" (2018) *11th Yong Pung How Professorship of Law Lecture*, [16]–[26] (https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2018.pdf accessed on 18 September 2018).

[131]CCAA, s 8.

[132]However, there is a provision permitting the parties to the claim to expressly agree that the subject matter of the claim is commercial in nature: Rules of Court, O 110, r 2(b)(iii).

[133]CCAA, s 4(1). The CCAA adopts a different definition of "international" for recognition and enforcement purposes: CCAA, s 4(2).

[134]Rules of Court, O 110, r 2(a)(iv).

[135]However, the lack of material foreign connecting factors may be a relevant consideration when the SICC is considering whether to decline to assume jurisdiction under Rules of Court, O 110 r 8.

[136]Yeo, *supra* note 54, [53].

[137]CCAA, s 11(1). The reference to "Singapore law" here is to be understood to include Singapore's choice of law rules: Hartley and Dogauchi Report, *supra* note 125, [125].

[138]Hartley and Dogauchi Report, *supra* note 125, [132], [134]. While the CCAA reserves the possibility of regulations being enacted to enable the Singapore court to decline to exercise jurisdiction in any other circumstances (CCAA, s 11(3)), to date, no regulations have been enacted.

on which jurisdiction may be refused and curtailment of the element of discretion under the CCAA may suggest that distinct procedural rules for assuming jurisdiction apply for claims under the CCAA. However, this is not the case. Instead, jurisdiction for cases falling under the CCAA will have to be asserted by using the existing jurisdictional frameworks,[139] although, as will be seen below, the fit is not seamless.

Relevantly for the SICC, a chosen court in Singapore is permitted to transfer the case to another Singapore court if the discretion to do so exists under Singapore law.[140] The chosen court must, however, before deciding on the issue of transfer, take into account the parties' choice of court.[141] While transfers are allowed, they may have repercussions at the recognition and enforcement stage. This point will be explored further below.

The general rules under which the SICC has jurisdiction have already been explained above.[142] If the case falls within the scope of the CCAA and the SICC is the chosen court, then in line with the first core principle of the HCCCA, it has an obligation to hear the case. The point made earlier in Part III above, that service under the SICC regime serves a notification rather than jurisdictional function applies *a fortiori* when the SICC is hearing a case which is subject to the CCAA. The parties cannot, after all, contract out of the CCAA.

If the case falls within the scope of the CCAA but the Singapore High Court is the chosen court,[143] again, service on the defendant serves a notification function Despite the obligation on the court to hear the case, service on a defendant who is not in Singapore and where the choice of court agreement does not contain a mechanism by which service may be effected in Singapore,[144] is ostensibly still subject to discretion.[145] This is because the CCAA makes no provisions for service and leave to serve on the defendant abroad will have to be sought pursuant to the three steps set out above in Part III(A) which apply to non-SICC cases. The three steps articulate what is required to fulfil the procedural rules for an application for leave to serve out that are set out in Order 11 rule 2. In relation to the first step, there appear to be a couple of heads of Order 11 which the plaintiff could rely on in this instance. One is rule 1(r): "the claim is in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the Court". The other is rule 1(s): "the claim concerns the construction,

[139]Order 110 of the Rules of Court, which deals specifically with the SICC, was amended to take into account the coming into force of the CCAA. However, the amendments do not paper over every irregularity between the two regimes.
[140]CCAA, s 11(5).
[141]*Ibid*, s 11(5).
[142]Part C.2.
[143]The parties would have to expressly make clear that their choice of the Singapore High Court excludes the SICC; see below, Section D.3(b).
[144]Rules of Court, O 10, r 3.
[145]Cf UK Civil Procedure Rules, r 6.33(2).

effect or enforcement of any written law", that written law being the CCAA in this case and the specific qualifier being the *enforcement* of the CCAA. As the CCAA sets out the Singapore court's obligations to assume jurisdiction in instances where it is the exclusively chosen court and to recognise and enforce a judgment from another exclusively chosen Contracting State court, Order 11 rule 1(s) would be appropriate if the Singapore court is called upon to assume either obligation.

Insofar as the third step is concerned, as noted above, the Singapore court is precluded from considering *forum non conveniens*.[146] The third step is the common law elucidation of Rule 2(2) of Order 11 which provides that: "No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of Singapore under this Order."[147] The question of whether "the case is a proper one for service out" would of course be context specific. If the case at hand does not involve a choice of court agreement, part of the question of whether "the case is a proper one for service out" would depend on the plaintiff being able to show that Singapore is *forum conveniens*. If there is an exclusive choice of court agreement in favour of the court of a non-Contracting State, the plaintiff will have to show strong cause why he should be allowed to breach the contract. However, if the case at hand falls within the scope of the CCAA and involves a choice of court agreement in favour of Singapore, the case would always be a "proper one for service out" simpliciter.[148] The result in the last scenario coheres with non-CCAA cases, where Singapore courts readily grant leave to serve the writ out where there is a choice of court agreement for Singapore in place. That said, it should not be overlooked that the court's jurisdiction is mandatory in a CCAA case and discretionary for a non-CCAA case; it would have been more appropriate for a rule that is equivalent to Order 110 rule 6(2) of the Rules of Court to be formulated for the former scenario.

For completeness, it should be noted that if the CCAA is engaged but the exclusive choice of court agreement is in favour of another Contracting State court, the case would not be a "proper one for service out" unless one of the exceptions set out in section 12 of the CCAA applies.

3. *The recognition and enforcement of SICC judgments under the HCCCA*

As explained above,[149] there are two ways in which the SICC may come to hear a case. First, where the parties have chosen the SICC as the forum for dispute resolution. Secondly, where the case has been transferred to the SICC from the

[146]Hartley and Dogauchi Report, *supra* note 125, [132], [134].
[147]*PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64, [30] and [60].
[148]Assuming that it has been established that there is a serious issue to be tried on the merits.
[149]Part C.2.

Singapore High Court. While reference may be made to choice of court agreements which fall outside the scope of the CCAA for comparison, the focus in this section is on choice of court agreements which are concluded on or after the 1 October 2016, which is the date on which the CCAA entered into force.

(a) *Where the parties have chosen the "SICC" as the forum for dispute resolution*

If the parties have inserted into their contract a choice of court agreement in favour of the SICC, the analysis is relatively straightforward. Even without an express designation of exclusivity, section 18F of the SCJA provides that the parties are presumed to have agreed to submit to the exclusive jurisdiction of the SICC unless there is an express provision to the contrary in the agreement. A debate as to whether section 18F will apply if the proper law of the contract is not Singapore law[150] is moot when the case falls under the scope of the CCAA as the concept of "deemed" exclusivity prevails under the Convention.[151] Thus, the SICC is the "chosen court" and as such, its judgment, subject to recognised defences being made out, must be recognised and enforced by other Contracting State courts.

(b) *Where the parties have chosen the "Singapore High Court" as the forum for dispute resolution*

According to the Rules of Court, an agreement to submit to the jurisdiction of the "High Court" which is concluded before 1 October 2016[152] does not of itself constitute an agreement to submit to the jurisdiction of the SICC.[153] These agreements fall outside the scope of the CCAA. In contrast, if the agreement to submit to the jurisdiction of the "High Court" is concluded on or after 1 October 2016, rule 1 (2)(*ca*) of Order 110, Rules of Court provides that: "the agreement is to be construed as including an agreement to submit to the jurisdiction of the [SICC], unless a contrary intention appears in the agreement."[154] In connection with this, the Hartley and Dogauchi Report explains that:

> [t]he choice of court agreement may refer either to the courts of a Contracting State in general, or to one or more specific courts in one Contracting State. Thus an agreement designating 'the courts of France' is regarded as exclusive for the purposes

[150]See further Yeo, *supra* note 54, [22].
[151]HCCCA, Article 3(b).
[152]This is the date on which the Choice of Court Agreements Act 2016 (No 14 of 2016), which enacts the HCCCA into Singapore law, entered into force.
[153]Rules of Court, O 110, r 1(2)(c).
[154]*Ibid*, r 1(2)(*ca*). See also, CCAA, s 2(2).

> of the Convention, even though it does not specify *which* court in France will hear the proceedings … In such a case, French law will be entitled to decide in which court or courts the action may be brought. Subject to any such rule, the plaintiff may choose any court in France.[155]

Thus, even if the choice of court agreement for the Singapore court does not specify the SICC, the SICC is the "chosen court" and can hear the claim if the subject-matter falls within its purview. Subject to any recognised defences being established, the resulting SICC judgment must be recognised and enforced in other Contracting State courts.

However, it may be the case that the parties did not intend to submit to the jurisdiction of the SICC, but lacking proper legal advice, did not appreciate that the form of words used did not exclude the jurisdiction of the SICC. There is no "contrary intention … in the agreement".[156] The wording of rule 1(2)(*ca*) appears to foreclose the possibility of the parties putting forward any other evidence to illustrate their intentions on the scope of the choice of court agreement. This is contrary to ordinary rules of contractual interpretation under Singapore law,[157] whereby extrinsic evidence may be admitted to interpret the terms of the contract.[158] There appears to be a conflation between, one the one hand, rules of evidence involving evidentiary presumptions and the admissibility of extrinsic evidence, and, on the other hand, substantive prescriptions on the nature of a choice of court agreement. However, rule 1(2)(*ca*) is based on Article 3(b) of the HCCCA[159] which provides that a choice of court agreement is "deemed to be exclusive unless the parties have expressly provided otherwise". The HCCCA skirts the issue of conflation by its careful choice of word. Brand and Herrup explain that: "The use of the term 'deemed' rather than 'presumed' was deliberate. The framers wished to avoid entanglements in local evidence law, including the nature of evidentiary presumptions."[160]

Nevertheless, the "deemed" exclusivity that operates under Article 3(b) of the HCCCA operates in a more palatable manner compared to Order 110, rule 1(2)(*ca*) of the Rules of Court. When Article 3(b) applies, there is consent to that particular court's jurisdiction after all, although that consent may be mischaracterised as consent to exclusive jurisdiction rather than to non-exclusive jurisdiction in

[155]Hartley and Dogauchi Report, *supra* n 125, [103] (footnote reference omitted).
[156]Rules of Court, O 110, r 1(2)(*ca*).
[157]Cf Choice of court agreements for the "Singapore High Court" which are concluded before 1 October 2016, where extrinsic evidence can be used to show that the parties did not intend to submit to the SICC.
[158]See further *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27, [2008] 3 SLR(R) 1029; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43, [2013] 4 SLR 193.
[159]Yeo, *supra* note 54, [36].
[160]R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (CUP, 2008), 42–43.

some cases. In the scenario posited above, the parties do not in reality agree to the SICC's jurisdiction, but are deemed to have done so by operation of rule 1(2)(*ca*). In contrast with the other instances fleshed out above, party autonomy is undermined within the SICC regime.[161] That said, the forfeit of autonomy could be justified as being for the greater good: when the resulting judgment comes before the court of another Contracting State, it would be entitled to recognition and enforcement under the HCCCA's rules. A further practical consequence relates to drafting practice: parties will need to be more considered in their drafting of jurisdiction agreements, instead of treating them as midnight clauses.

(c) *When the case is transferred from the Singapore High Court to the SICC*

As alluded to above, one can expect most of the cases which the SICC hears in its nascent years to be transfer cases, ie cases which originate in the Singapore High Court but which are transferred to the SICC pursuant to Order 110, rule 12.[162] The enforceability of judgments in transfer scenarios is therefore an important issue.

Where the parties have chosen the "Singapore High Court" and the case is commenced in the High Court, a transfer to the SICC does not raise particular issues as that choice will be taken to include the SICC for agreements concluded on or after 1 October 2016.[163] If there is no express provision otherwise, the agreement is deemed to be exclusive in nature[164] and would fall within the scope of the CCAA. Other non-chosen Contracting State courts must refuse to hear the case and the SICC judgment must be recognised and enforced in other Contracting State courts.

However, where the parties have expressly indicated that their choice of the "Singapore High Court" excludes the SICC, one must tread more carefully. If the choice of court agreement predates the coming into force of the CCAA, the High Court can order the transfer on its own motion.[165] However, if the choice of court agreement falls within the scope of the CCAA, the Rules of Court as amended to take into account the coming into force of the CCAA stipulate that the case may be transferred from the High Court to the SICC only if the parties consent to the transfer.[166] This goes over and above the threshold set by the CCAA, which does not mandate party consent for transfers but qualifies the

[161]Yeo has pointed out that the deeming provision under Article 3(b) is sensible from the perspective of procedural efficiency but the deeming provisions under the SICC rules operate to "broaden the jurisdiction of the Singapore courts". Yeo TM, *supra* note 130, [15].
[162]See above, note 28.
[163]Rules of Court, O 110, r 1(2)(*ca*). See also CCAA, s 2(2). The plaintiff may, if it wishes, commence proceedings directly in the SICC.
[164]HCCCA, Art 3(b); CCAA, s 3(2).
[165]Rules of Court, O 110, r 12(4)(b)(ii). The issue of the recognition and enforcement of the resulting SICC judgment falls outside the scope of the HCCCA.
[166]*Ibid*, r 12(3B).

freedom to transfer by cautioning that: "the chosen court must, before exercising that discretion, take into account the parties' choice of court."[167]

There appear to be at least two related reasons why party consent is required. First, judgments from a transfer case still fall within the recognition and enforcement regime of the HCCCA, notwithstanding that the judgment may not be from the "chosen court".[168] However, Article 8(5) of the HCCCA provides that:

> where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin.

Making party consent a pre-requisite for any transfer from the High Court to the SICC ensures that the SICC judgment will be recognised and enforced in other Contracting States. Secondly, if the parties wish to choose the Singapore High Court *sans* SICC, they would have to positively indicate that they do not wish to include the SICC in their choice of court agreement since the SICC is a division of the Singapore High Court. This makes it far harder for a transfer to be justified if it is done without the parties' consent, all the more so given the rather different framework within which the SICC operates, and far harder for a court in another Contracting State to justify enforcing the SICC judgment.[169] Thus, mandating party consent for transfer cases enhances the confidence of litigants in the portability of SICC judgments and the attractiveness of the SICC as a forum for dispute resolution in general.

Another notable provision is Order 110, rule 13A(2) of the Rules of Court. This provides:

> In any case mentioned in Rule 12(3B) where an exclusive choice of court agreement designates the High Court, but not the [SICC], as a chosen court for the case, the High Court may, before transferring the case to the [SICC], direct every party to the exclusive choice of court agreement to vary that agreement, so as to designate the [SICC] as a chosen court for the case.[170]

The variation can only be ordered where, in accordance with Order 110, Rule 12 (3B), there has been party consent to the transfer. This means that even without such a variation, the SICC judgment would still benefit from mandatory recognition and enforcement in other Contracting States. However, with a varied

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[167]CCAA, s 11(5).

[168]Courts of other Contracting States may hear the case given that the SICC would not be the "chosen court": Art 6(e).

[169]The case can be transferred from the High Court to the SICC without parties' consent for non-HCCCA cases. See Rules of Court, O 110, r 12(4)(b)(ii).

[170]A corresponding provision gives the SICC the power to direct the parties to vary a SICC choice of court agreement in favour of the High Court before the transfer of the case from the SICC to the High Court. See Rules of Court, O 110, r 13A(1).

clause in favour of the SICC, the recognition and enforcement of its judgment in other Contracting States will be a more straightforward affair as it will be treated as a non-transfer judgment. Rule 13A(2) therefore serves to further bolster the enforceability of SICC judgments abroad.

V. Conclusion

Respect of party autonomy is now the norm in international commercial dispute resolution. Negotiators at the Hague Conference realised that, rather than continuing intractable negotations on a broad-based Convention, focusing on party autonomy provided the surest route to harmonisation. The resulting Convention and the CCAA by and large pays heed to this principle. In contrast, the embrace of party autonomy in the SICC framework serves a different purpose; it is to accentuate Singapore's competitive advantage as a dispute resolution hub. As this article has highlighted, the SICC regime upholds party autonomy to an unprecedented degree in a number of respects. Parties have the liberty to define their claims so that it would be construed to fall within the subject-matter jurisdiction of the SICC. A choice of court agreement in the SICC's favour is treated as dispensing with the usual jurisdiction-founding function of service of process. The traditional common law tests dealing with the exercise of jurisdiction are also disregarded or tweaked within the SICC's jurisdictional framework. The CCAA and corresponding procedural rules have been drafted to make certain that SICC judgments will enjoy portability under the HCCCA.

Many of these developments build on existing pro-autonomy rules. The dispensation of the court's leave for service out of jurisdiction where there is a written jurisdiction agreement in the SICC's favour arguably takes but a small step outside of existing Singapore rules. The irrelevance of *Spiliada* principles in cases involving written SICC jurisdiction agreements reinforces the already strong common law attitude towards the enforcement of jurisdiction agreements. The broadening of the range of factors that can be considered under the *Spiliada* test where there is a possibility of transfer of proceedings from the High Court to the SICC is also consistent with the underlying philosophy and modern application of the test.

The case study of Singapore further offers reflections on a more general level. Viewed against the global trend of setting up specialist courts and the increased interest in harmonisation of rules, the Singapore experience offers food for thought on how far the recalibration of balance between forum-state regulatory authority and party autonomy should be pushed. In particular, two issues may bear further thought. First, is leave of court truly necessary for service of legal process abroad where the parties have agreed to submit to the jurisdiction of the forum court? Secondly, how the *Spiliada* test relates to non-exclusive jurisdiction agreements warrants fuller consideration. Given the variety of non-exclusive jurisdiction agreements in practice, a "one size fits all" test may not be appropriate.

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Postcript

As of 1 November 2018, pursuant to section 18D(2) of the SCJA, the SICC's jurisdiction has been expanded to include jurisdiction to hear any proceedings relating to international commercial arbitration that the Singapore High Court may hear under the International Arbitration Act (Cap 143A, Rev Ed 2002). These applications include stay of proceedings, interim measures, challenges to arbitrators, challenges to awards, recognition and enforcement of awards, appeals on ruling of jurisdiction and subpoenas. This recent amendment of the SICC rules does not affect the analysis put forward in this article.